Volume 110
Issue 1 *Dickinson Law Review - Volume 110, 2005-2006*

6-1-2005

Indeterminate ≠ Immunity: A Review of the Pennsylvania Sentencing Guidelines

Angelica L. Revelant

Indeterminate ≠ Immunity: A Review of the Pennsylvania Sentencing Guidelines

Angelica L. Revelant*

I. Introduction

Jeffrey L. Fisher has recently "rocked the worlds of criminal procedure and sentencing."[1] The 34-year-old Seattle associate got more than he bargained for when he took Ralph Blakely's case on appeal to the United States Supreme Court.[2] Since *Blakely v. Washington*[3] was decided on June 24, 2004, the criminal justice system has been in uncertain turmoil as state courts struggle to determine whether *Blakely* applies to their sentencing guideline systems.[4] Recently, in *United States v. Booker*,[5] the Supreme Court held that *Blakely* applied to the Federal Sentencing Guidelines and rendered them unconstitutional.[6] Given that the *Booker* decision was rendered on January 12, 2005,[7] the effect of this

---

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2006; B.S./B.A. University of Pittsburgh, 2000. Sincere thanks to my husband, Tim, for his endless love and support. The author would also like to thank her mother, Joanne Kiggins, Erica Cline-Blackledge and Peter O'Mara for their encouragement, and Jay A. Abom, Esquire, for the research assignment that spawned the idea for this Comment.

1. Leonard Post, *An Associate Rocks Criminal Procedure*, 27 NAT'L L.J. 16 (2004).
2. *See id.*
3. 124 S. Ct. 2531 (2004).
4. *See* John Gibeaut, *Future Factors: After Sentencing Rulings, Many States Are Poised to Revamp Their* Systems, 91 A.B.A. 14 (Mar. 2005). Prior to the *United States v. Booker* decision, several Pennsylvania courts discussed *Blakely*'s effect on the Federal Sentencing Guidelines and reached different conclusions. *See, e.g.*, United States v. Jarrett, 334 F. Supp. 2d 810, 814-821 (W.D. Pa. 2004) (finding *Blakely* applied but did not preclude imposition of guidelines sentence); United States v. Fotiades-Alexander, 331 F. Supp. 2d 350 (E.D. Pa. 2004) (holding that *Blakely* applied but the sentence was imposed properly); United States v. Harris, 325 F. Supp. 2d 562, 563-65 (W.D. Pa. 2004) (finding *Blakely* applied and rendered guidelines unconstitutional as a whole); United States v. Leach, 325 F. Supp. 2d 557, 558-62 (E.D. Pa. 2004) (finding *Blakely* applied and rendered guidelines unconstitutional as applied).
5. United States v. Booker, 125 S. Ct. 738 (2005).
6. *See id.* at 746.
7. *Id.* at 738.

decision on state systems remains to be seen.

However, *Blakely* and *Booker* are not merely about sentencing guidelines. Rather, they invoke clarification of the principles of the Sixth Amendment to the United States Constitution.[8] The right to jury trial, guaranteed by the Sixth Amendment,[9] is fundamental to the system of criminal procedure.[10] Included in this right is the notion that the prosecution must prove every element of the crime charged beyond a reasonable doubt.[11] However, some of the factors used to determine a sentence are not elements of the offense, such as the whether a weapon was involved[12] or the location of the crime.[13] Prior to *Blakely* and *Booker*, a judge could use these "enhancement" factors to increase a sentence, even if the factors were not charged in the information and not presented to a jury.[14] Despite the rulings in *Blakely* and *Booker* that these facts must be proven to a jury beyond a reasonable doubt,[15] Pennsylvania courts have not complied, asserting that the Pennsylvania Sentencing Guidelines are advisory.[16] Thus, Pennsylvania judges are still permitted to use enhancement factors not presented to a jury. Regardless of whether the Guidelines are advisory, the provisions that

---

8. U.S. CONST. amend. VI.

9. *Id.*

10. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (the Sixth Amendment's jury trial guarantee was applied to the states); *see also* Respublica v. Doan, 1 U.S. 86 (1784) (the Pennsylvania Constitution guarantees the right to jury trial in all civil cases); PA. CONST. art. I, § 6 ("trial by jury shall be as heretofore, and the right thereof remain inviolate"); PA. CONST. art. I, § 9 ("in all criminal prosecutions the accused hath a right to a speedy public trial by an impartial jury").

11. *See, e.g.,* Patterson v. New York, 432 U.S. 197 (1977).

12. *See* 204 PA. CODE § 303.9(b) (1985) (relating to Deadly Weapon enhancement sentence recommendations).

13. *See, e.g.,* 42 PA. CONS. STAT. § 9713 (1982) (when the crime occurs in or near public transportation); 204 PA. CODE § 303.9(c) (1985) (relating to School Enhancement sentence recommendations. If the court determines that an offender violated the drug act, twelve (12) months shall be added to the lower limit of the standard range and thirty-six (36) months shall be added to the upper limit of the standard range.).

14. *See, e.g.,* 42 PA. CONS. STAT. § 9712(b) (proof at sentencing for offenses committed with firearms).

> Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

Id.

15. *See* Blakely v. Washington, 124 S. Ct. 2531 (2004); United States v. Booker, 125 S. Ct. 738 (2005).

16. *See infra* Part IV.D.

permit a judge to enhance a sentence using factors not proven to a jury are unconstitutional.

This Comment focuses on the Pennsylvania Sentencing Guidelines and the impact of the *Blakely* and *Booker* decisions on Pennsylvania's criminal procedure jurisprudence. Part II summarizes the history of, and the problems with, the Pennsylvania sentencing system. Part III discusses the principal United States Supreme Court cases that ultimately led to the *Blakely* decision. A discussion of the *Blakely* decision, as well as a review of its effect in Pennsylvania, is provided in Part IV. Part V discusses the *Booker* opinion. Finally, Part VI analyzes the future of the Pennsylvania system in light of these Supreme Court decisions.

II. The Pennsylvania Sentencing System

A. A Brief History

Sentencing courts in Pennsylvania have generally harbored "unfettered discretion in imposing sentences."[17] Pennsylvania's criminal statutes specify the elements, grade and degree of each particular state crime.[18] The General Assembly created a Sentencing Code[19] that provides the maximum legal sentences for these offenses.[20] For a sentence of total confinement, the trial court must impose both a maximum and minimum sentence.[21] The court has discretion to impose a sentence anywhere within the statutory limits. Pennsylvania has an indeterminate[22] sentencing system, which allows judicial discretion to permit more individualized sentencing.[23] Discretion is only limited in that the sentence imposed must be within statutory limits and imposed only after consideration of the sentencing guidelines.[24] The Pennsylvania Sentencing Code[25] requires that the court, in imposing a sentence, "shall consider any guidelines for sentencing adopted by the

17. Commonwealth v. Mouzon, 812 A.2d 617, 620 n.2 (Pa. 2002).

18. *See, e.g.*, PA. CONS. STAT. tit. 18 (1998).

19. *See* 42 PA. CONS. STAT. § 9701 (1995) (relating to Sentencing Code provisions).

20. *See, e.g.*, 18 PA. CONS. STAT. § 1103 (1996) (sentences of imprisonment for felony); 18 PA. CONS. STAT. § 1104 (1996) (sentences of imprisonment for misdemeanor).

21. 42 PA. CONS. STAT. ANN. § 9756(a)(b) (2000).

22. "Indeterminate," as it relates to sentencing, is defined as "the practice of not imposing a definite term of confinement, but instead prescribing a range for the minimum and maximum term." BLACK'S LAW DICTIONARY 774 (7th ed. 1999). "Determinate sentencing," by contrast, fixes a defined period of time. *Id.* at 1367.

23. *See* Commonwealth v. Martin, 351 A.2d 650 (Pa. 1976).

24. *See* 42 PA. CONS. STAT. § 9721 (1998) (relating to sentencing generally).

25. *Id.* § 9701.

Pennsylvania Commission on Sentencing."[26]

The Commission on Sentencing was created in 1978 to establish guidelines to be considered by courts when imposing sentences.[27] The General Assembly subsequently adopted the Pennsylvania Sentencing Guidelines generated by the Pennsylvania Sentencing Commission.[28] These Guidelines provide a standard range of minimum sentence, based on the gravity of the offense charged and the defendant's prior record.[29] The Guidelines also set forth aggravated and mitigated sentencing ranges.[30]

The Pennsylvania Supreme Court, in *Commonwealth v. Mouzon*,[31] discussed the Pennsylvania Sentencing Guidelines in reviewing a challenge to the discretionary aspects of a sentence imposed within the statutory limits.[32] The Pennsylvania Supreme Court recognized that the Guidelines were implemented to address the problem of disparity in sentencing and to restrict the discretion afforded sentencing judges.[33] It acknowledged that a sentence might be excessive even if it is within the statutory limits.[34] However, it also stated that the guidelines are not mandatory, that "courts retain broad discretion in sentencing matters."[35] The Pennsylvania Superior Court has provided insight as well, stating that "[a]lthough the sentencing guidelines specify definitive ranges of minimum sentences, the adoption of the guidelines was not intended to preclude judicial discretion."[36] The Superior Court reiterated this theme in more recent cases, concluding that "the sentencing guidelines are advisory only."[37] The problem in reconciling these statements with the

---

26. *Id.* § 9721(b).
27. *See, e.g.*, Commonwealth v. Sessoms, 532 A.2d 775 (Pa. 1987).
28. 204 PA. CODE §§ 303.1-303.18 (1994).
29. *See id.*
30. *See id.* § 303.13.
31. 812 A.2d 617 (Pa. 2002).
32. *See id.* at 620.
33. *Id. See also* Commonwealth v. Royer, 476 A.2d 453 (Pa. Super. Ct. 1984) (stating that the purpose of sentencing guidelines is to ensure that uniform sentences are imposed); 204 PA. CODE §§ 303.11(a) (relating to the purpose of sentence).
34. *Mouzon*, 812 A.2d at 623.
35. *Id.* at 620.
36. Commonwealth v. Frazier, 500 A.2d 158, 161 (Pa. Super. Ct. 1985).
37. *See, e.g., In re* J.M.P., 863 A.2d 17, 19 n.4 (Pa. Super. Ct. 2004) ("We recognize that the Sentencing Guidelines are merely advisory and sentencing judges may sentence outside of the guidelines if they deem it appropriate to do so and offer good reasons"); Commonwealth v. Eby, 784 A.2d 204, 206 (Pa. Super. Ct. 2001) (guidelines are merely advisory); Commonwealth v. Davis, 737 A.2d 792, 798 (Pa. Super. Ct. 1999) (citing Commonwealth v. Gibson, 716 A.2d 1275, 1277 (Pa. Super. Ct. 1998)) (sentencing court may sentence outside the guidelines so long as it offers reasons); Commonwealth v. Pittman, 737 A.2d 272, 274 (Pa. Super. Ct. 1999) (stating that the guidelines were not mandatory and court was free to sentence to any statutorily-allowed term it deemed appropriate).

intended purpose of the guidelines is evident.

B. The Problems: Are the Guidelines Mandatory?

Despite the general view that the Pennsylvania guidelines are merely advisory,[38] there are several indications that use of the guidelines is more than suggested. First, trial judges are required to recite the permissible range of sentences under the guidelines and to state on the record clear reasons for departing from them when imposing a sentence.[39] The Pennsylvania Superior Court in *Commonwealth v. Johnson*[40] stated that the judge may deviate from the guidelines after considering "the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense . . . so long as he also states of record the factual basis and specific reasons which compelled him to deviate from the guideline range."[41] When the court imposes a sentence outside the guidelines, the court "shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines."[42]

A common "misconception"[43] is that the sentencing court is free to impose any sentence within the limits allowed by law, so long as it states its reasons on the record.[44] However, the Superior Court recently dispelled this belief, holding that sentencing courts must "faithfully adhere" to the guidelines.[45] This is a marked retreat from its previous allusion that the guidelines are merely advisory.

These requirements seem averse to the long-standing view that the guidelines are not mandatory. If the trial court's decision will be overturned for failure to consider the guidelines,[46] asserting that they are advisory is illogical. If the judge is not bound by the guidelines, the judge should not be required to state his reasons for departure from them. The Sentencing Commission could hardly expect use of the guidelines to reduce disparity in sentencing if it did not intend that the guidelines be

38. *See id.*

39. 42 PA. CONS. STAT. § 9721(b) (1998) (relating to sentencing generally); *see, e.g.*, Commonwealth v. Royer, 476 A.2d 453, 455-56 (Pa. Super. Ct. 1984) ("In every case where a sentence is imposed, the court must state on the record at sentencing the reasons for the imposition of sentence").

40. 666 A.2d 690 (Pa. Super. Ct. 1995).

41. *Id.* at 693. *See* 42 PA. CONS. STAT. § 9721(b) (1998) (relating to sentencing generally).

42. 42 PA. CONS. STAT. § 9721(b) (1998).

43. *See* Commonwealth v. Walls, 846 A.2d 152 (Pa. Super. Ct. 2004).

44. *See id.*

45. *Id.* at 156 (law requires "faithful" adherence to the guidelines).

46. *See* 42 PA. CONS. STAT. § 9781(c) (1980) (relating to appellate review of sentence).

followed as mandatory.[47]

The Superior Court recognized that a sentencing court is not free to reject the guidelines and "interpose its own sense of just punishment." In so doing, the intended goal in using the guidelines to promote consistency "would be frustrated and we would be, *de facto,* in a sentencing environment that existed prior to the passage of the guidelines."[48] Thus, the sentencing court is not permitted to give only a cursory glance at the guidelines.

If a judge is not free to impose a sentence within his discretion by rejecting the guidelines, for fear of frustrating the purpose of the guidelines, and retreating to a pre-guidelines system, the necessary implication is that the guidelines are more than merely advisory. If the prior system allowed unfettered discretion and the guidelines were implemented to restrict discretion to promote uniformity, the only manner of achieving this goal is for actual, mandatory utilization of the guidelines.

Second, the Sentencing Code provides for appellate review of sentencing.[49] Appellate review is discretionary with respect to all aspects of sentencing except the legality of the sentence.[50] Appellate courts must determine whether the sentence imposed is appropriate under the Sentencing Code and whether the judge considered the guidelines as required.[51] A sentence is to be vacated if it is deemed unreasonable, or if the guidelines were not considered at all in the imposition of sentence.[52] The Superior Court admitted that, in spite of its previous assertions, "appellate review of sentencing would become a mockery and a sham if all sentences were routinely affirmed under the guise of discretion of the trial court."[53]

Evidence of the problems with the Pennsylvania Sentencing Guidelines is illustrated in the Federal Sentencing Guidelines.[54] Although recently declared unconstitutional,[55] the Federal Guidelines were mandated by Congress to be binding on judges as a matter of law.[56]

---

47. *See* State v. Jorgensen, 667 N.W.2d 318, 335 n.16 (Wis. 2003) (explaining that use of the sentencing guidelines to reduce disparity in sentencing implies intent for judges to follow the guidelines and impose sentences within guideline ranges).

48. Commonwealth v. Walls, 846 A.2d 152, 158-59 (Pa. Super. Ct. 2004).

49. 42 PA. CONS. STAT. § 9781(c) (1980) (relating to appellate review of sentence).

50. *Id.* § 9781(b).

51. *Id.* § 9781(c).

52. *Id.* § 9781.

53. Commonwealth v. Smart, 564 A.2d 512, 514 (Pa. Super. Ct. 1989).

54. *See* 18 U.S.C. § 3553(b) (2000) (sentencing guidelines created by the Sentencing Commission).

55. *See* United States v. Booker, 125 S. Ct. 738 (2005) (holding that the Federal Sentencing Guidelines violate the Sixth Amendment and are unconstitutional).

56. 18 U.S.C. § 3553(b) (2000).

Under the Federal Guidelines, a judge was required to sentence within the Guidelines as well as to provide reasons for the sentence imposed, including reasons for departure from the Guidelines.[57] The Federal Guidelines were implemented to reduce sentencing disparity.[58] As the Federal Guidelines and Pennsylvania Guidelines have similar purposes, namely reducing disparity in sentencing, as well as similar requirements, mandating consideration of the guidelines and reasons for departure from them, the Pennsylvania guidelines are not advisory, but mandatory, and quite possibly, unconstitutional.

Finally, methods of statutory construction reveal that the Commission in its creation, and the General Assembly in its adoption, of the Guidelines intended for them to be mandatory in nature.[59] Use of the word "shall" in provisions of the Pennsylvania Code evidences mandatory intent.[60] Had the intention been for permissive use, or mere consideration, the Commission would have used the word "may."[61] Additionally, the Guidelines include mandatory minimum provisions,[62] in which the sentencing court does not have discretion in imposing a sentence lower than the minimum sentences prescribed.[63] It is an anomaly to insist that a mandatory provision exists within a guidelines scheme that is advisory.

Regardless of whether the sentencing guidelines are advisory, Pennsylvania courts have missed the boat regarding the implications that *Blakely*,[64] and now *Booker*,[65] have on the Pennsylvania sentencing

57. *Id.* § 3553(c).

58. *See id.* § 3553 (sentencing guidelines are intended to reduce disparate sentencing).

59. *See* 204 PA. CODE. § 303.1(a) ("The court shall consider the sentencing guidelines in determining the appropriate sentence for offenders convicted of . . . felonies and misdemeanors").

60. The word "shall" carries an imperative or mandatory meaning. *See* Oberneder v. Link Computer Corp., 696 A.2d 148, 150 ("By definition, 'shall' is mandatory"); BLACK'S LAW DICTIONARY 1375 (7th ed. 1999) ("In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion").

61. *See* Jennison Family Ltd. P'ship v. Montour Sch. Dist., 802 A.2d 1257, 1262 (Pa. Commw. Ct. 2002) (remarking that in "other portions of the statute in question, "shall" was used where no discretion clearly was meant to be vested, whereas "may" was used to indicate that an action was permissive").

62. *See, e.g.*, 42 PA. CONS. STAT. § 9712(a) (1982).

63. *See, e.g.*, Commonwealth v. Sanchez-Rodriguez, 814 A.2d 1234 (Pa. Super. Ct. 2003) ("When mandatory minimum sentences are mandated by statute, the sentencing courts discretion is restricted to compliance"); *see also* 42 PA. CONS. STAT. § 9712(a) (1982).

64. Blakely v. Washington, 124 S. Ct. 2531 (2004).

65. United States v. Booker, 125 S. Ct. 738 (2005).

system.[66] In order to clearly address how these decisions have devastating effects, not only on how the courts interpret Blakely, but also on the guidelines themselves, the discussion turns first to these remarkable decisions.

III. A Summary of Pre-*Blakely* Cases

There are five primary United States Supreme Court cases prior to *Blakely*[67] that discuss whether a judge may increase a sentence using factors not presented to the jury or proven beyond a reasonable doubt.[68] The same Justices spoke for the majority in each of these 5-4 decisions.[69] The significance of the *Blakely* decision is partially due to a change in the writers of the majority opinion.[70] *Blakely* was the second[71] instance in which the minority in the Court's previous three decisions became the majority.

The Court in *In re Winship*[72] held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[73] However, *Winship* does not address when a particular fact is to be considered an element, and this query is the subject of an important discussion in *McMillan v. Pennsylvania*.[74] The Court in *Winship* reiterated that the right to jury trial is "basic in our law and rightly one of the boasts of free society."[75] Justice Frankfurter stated that "[t]he reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error."[76] The stigma and loss of liberty that come with a conviction warrant the high standard of proof in criminal matters.[77] The fact that a judge may increase a sentence by using

66. *See infra* Parts IV.D, VI.

67. *Blakely*, 124 S. Ct. 2531 (2004).

68. *In re* Winship, 397 U.S. 358 (1970); McMillan v. Pennsylvania, 477 U.S. 79 (1986); Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Harris v. United States, 536 U.S. 545 (2002).

69. Chief Justice Rehnquist, Justice Breyer, Justice O'Connor, Justice Kennedy and Justice Thomas wrote for the majority of the first three cases discussed. *Id.* Justice Scalia, Justice Stevens, Justice Souter and Justice Ginsburg comprised the dissenting opinions. *Id.*

70. Justice Thomas reversed course in Jones v. United States, 526 U.S. 227 (1999), joining the majority including Justice Souter, Justice Scalia, Justice Stevens and Justice Ginsburg. *Id.*

71. The first instance was in Jones v. United States, 526 U.S. 227 (1999).

72. 397 U.S. 358 (1970).

73. *Id.* at 364.

74. 477 U.S. 79 (1986).

75. *Winship*, 397 U.S. at 363.

76. *Id.* at 363-64.

77. *See* Patterson v. New York, 432 U.S. 197 (1977) (holding that "[t]he Due

factors proven by a preponderance of the evidence[78] is in direct contradiction of the reasonable doubt standard and the right to jury trial. Permitting a reduced standard on factors used to further restrict one's liberty interest is a violation of due process.

McMillan v. Pennsylvania[79] is the United States Supreme Court's first discussion of "sentencing factors," as distinguished from an element of an offense. The *McMillan* case was a consolidated appeal of four cases before the Pennsylvania Supreme Court.[80] The United States Supreme Court granted certiorari to determine the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act[81] under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment.[82] The Court in *McMillan* discussed Pennsylvania's Sentencing Act, which provides that "a person convicted of one of a number of enumerated felonies is subject to a minimum sentence of five years of incarceration."[83]

The felonious conduct in each of the cases was visible possession of a firearm.[84] Under the Pennsylvania Sentencing Act, visible possession is not an element of the crime and the Commonwealth is therefore not required to prove it beyond a reasonable doubt.[85] The Act expressly states that visible possession of a firearm is not an element but rather a factor to be considered at the time of sentencing.[86] The *McMillan* Court found that the Act "operates solely to limit the sentencing court's discretion in selecting a penalty."[87] In fact, if at sentencing the judge finds evidence of visible possession of a firearm by a preponderance of the evidence, the judge must order a sentence of at least five years.[88] The Pennsylvania Supreme Court reversed each trial court decision, holding that the Act was consistent with due process guarantees.[89] The Court held that "there is no Sixth Amendment right to jury sentencing."[90]

The dissent stated that the majority gave inappropriate deference to

---

Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged").

78. *See, e.g.*, 42 PA. CONS. STAT. § 9712(b) ("The court . . . shall determine, by a preponderance of the evidence, if this section is applicable").

79. 477 U.S. 79 (1986).

80. *See id.* at 82.

81. 42 PA. CONS. STAT. § 9712 (1982).

82. *See McMillan*, 477 U.S. at 81.

83. 42 PA. CONS. STAT. § 9712(a) (1982). *See McMillan*, 477 U.S. at 81.

84. *McMillan*, 477 U.S. at 82.

85. *See id.*

86. *See id.* at 85.

87. *Id.* at 88.

88. 42 PA. CONS. STAT. § 9712(c) (1982).

89. *See McMillan*, 477 U.S. at 84.

90. *Id.* at 93.

the fact that the Pennsylvania legislature did not make the specific fact an element of the crime.[91] Justice Stevens, dissenting, wrote that "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*."[92]

An important element of the Court's analysis was its indication that the mandatory minimum statute did not permit increasing the penalty beyond the statutory maximum.[93] Since the courts in Pennsylvania have discretion to impose a sentence within the range permitted by statute, as long as the sentence imposed does not go beyond the maximum in the statute, it is permissible. However, what the courts had failed to recognize thus far is that factors considered by a judge, and not proven to a jury, could require a minimum sentence to be imposed, thereby exposing the defendant to a greater punishment. As the Court in *Patterson v. New York*[94] stated, the Due Process Clause requires proof beyond a reasonable doubt in such circumstances, and those factors should not be considered by the judge in sentencing alone. This dilemma was corrected in the next case.

Jones v. United States[95] is significant because it was the first of the five prominent United States Supreme Court cases finding facts that may increase a sentence to be elements rather than sentencing factors, requiring submission of those facts to a jury.[96] In addition, the dissenters in the four previous cases delivered the majority opinion in *Jones*, gaining a majority through Justice Thomas. The Court held that although "every fact with a bearing on sentencing" need not be found by a jury,[97] mandatory statutory provisions establishing higher penalties are elements of the offense, not sentencing considerations.[98] The Court held that the Fifth and Sixth Amendments require these elements to be charged in the indictment, submitted to the jury and proven beyond a reasonable doubt.[99] This case turned the tables for the United States Supreme Court and began a closer analysis of the Sixth Amendment jury trial guarantee.

---

91. *See id.* at 93-95 (Marshall, J., dissenting).

92. *Id.* at 103 (Stevens, J., dissenting).

93. *See id.* at 88.

94. *See* Patterson v. New York, 432 U.S. 197, 210 (1977) (clarifying that the Due Process Clause requires proof beyond a reasonable doubt of conduct which exposes a criminal defendant to greater stigma or punishment).

95. 526 U.S. 227 (1999).

96. *See id.*

97. *Id.* at 248. *See, e.g.,* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (recidivism need not be proven at trial for fear of unfair prejudice to the defendant).

98. *See Jones*, 526 U.S. at 248.

99. *Id.* at 243 n.6.

Apprendi v. New Jersey,[100] a landmark case regarding sentencing, established the rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[101] The Court in *Apprendi* held that the defendant's constitutional rights were violated when the judge imposed a sentence greater than the maximum allowed under state law.[102] This is important, as the *Apprendi* rule has been cited as prohibiting only those sentences that exceed the statutory maximum.[103] The rule, however, does not prevent judges from imposing a sentence within statutory limits or from increasing a minimum sentence based on facts not proven to a jury beyond reasonable doubt.[104] The *Apprendi* rule has come under attack, as it was unclear whether the Court meant to limit its application only to facts that increase the maximum sentence.[105]

The confusion was not eliminated in *Harris v. United States*,[106] where the Court considered the constitutionality of a federal statute that imposed a mandatory minimum sentence.[107] The Court stated that the "judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries without contradicting *Apprendi*."[108] However, it was disputed whether there is a difference between facts that enhance the maximum sentence and those that enhance a minimum sentence.[109] The answer to this

100. 530 U.S. 466 (2000).

101. *Id.* at 490.

102. *See id.*

103. *See, e.g.*, Commonwealth v. Roney, No.354-CAP, 2005 WL 106771 (Pa. Jan. 20, 2005) (stating that the death penalty does not constitute a sentence beyond the statutory maximum for purposes of *Apprendi*); Commonwealth v. Bromley, 862 A.2d 598 (Pa. Super. Ct. 2004) (stating that the *Apprendi* rule was not implicated when defendant was sentenced within the aggravated range, but below the statutory maximum); Commonwealth v. Ryerson, 817 A.2d 510 (Pa. Super. Ct. 2003) (holding that *Apprendi* was inapplicable since the court did not impose a sentence in excess of the statutory maximum); Commonwealth v. Fremd, 860 A.2d 515 (Pa. Super. Ct. 2004) (holding *Apprendi* did not apply because the sentence fell within statutory range); Commonwealth v. Chambers, 852 A.2d 1197 (Pa. Super. Ct. 2004) (*Apprendi* and *Jones* are of no applicability when the case involved a sentence enhancement that does not enhance the sentence beyond the statutory maximum).

104. *See Apprendi*, 530 U.S. at 481.

105. *See, e.g.*, Harris v. United States, 536 U.S. 545 (2002) (plurality opinion); United States v. Booker, No.04-104, 2005 WL 50108 (S. Ct. Jan. 12, 2005).

106. 536 U.S. 545, 570 (2002).

107. *See id.* at 2411.

108. *Id.* at 2415.

109. *Compare Harris*, 536 U.S. at 579-80 (Thomas, J., dissenting) ("there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum") *with Harris*, 536 U.S. at 569-79 (Breyer, J., concurring) ("[t]he Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*)

dispute is found in *Blakely v. Washington*[110] and *United States v. Booker*.[111]

IV. Blakely v. Washington

A. Factual Background and Procedural History

Ralph Blakely, Jr. pled guilty in the Washington Superior Court to second-degree kidnapping involving domestic violence and use of a firearm.[112] The statutory maximum for this class B felony is ten years.[113] The facts in the plea supported a sentence in the standard range of forty-nine to fifty-three months.[114] The judge imposed a sentence of ninety months,[115] finding the defendant acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range.[116]

The defendant appealed his sentence to the Washington State Court of Appeals.[117] He alleged that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.[118]

B. The Supreme Court's Holding

The United States Supreme Court granted certiorari to decide whether a sentence imposed, which is less than the statutory maximum, but greater than the standard range for the offense, violates the defendant's Sixth Amendment right to a jury trial when the trial judge increased the sentence based on facts not submitted to the jury.[119] The Supreme Court decided in favor of the defendant, holding that the sentence was illegal.[120] The Court held that factors that increase a defendant's sentence within or beyond the maximum range of sentencing guidelines must be presented to the jury.[121]

---

or the application of a mandatory minimum (as here)").

110. 124 S. Ct. 2531 (2004). *See* discussion *infra* Part IV.

111. 125 S. Ct. 738 (2005). *See* discussion *infra* Part V.

112. *Blakely*, 124 S. Ct. 2531, 2534 (2004).

113. *Id.* at 2535.

114. *See id.* at 2534.

115. *See id.* at 2535.

116. *See id.*

117. State v. Blakely, 47 P.3d 149 (Wash. App. Ct. 2002) (affirmed).

118. State v. Blakely, 62 P.3d 889 (Wash. 2003) (review denied).

119. Blakely v. Washington, 124 S. Ct. 429 (2003) (cert. granted).

120. Blakely v. Washington, 124 S. Ct. 2531 (2004) (All further citations to *Blakely* will reference this decision.).

121. *Id.*

As a result of *Blakely*, judges no longer have the discretion to increase a defendant's sentence based on mandatory enhancement factors if those facts have not been proven beyond a reasonable doubt.[122] The *Blakely* Court found the Washington Sentencing Guidelines unconstitutional as applied but reserved the question of whether the Federal Sentencing Guidelines were constitutional.[123]

C. *Analysis of the Court's Reasoning*

The majority in *Blakely* applied the *Apprendi* rule,[124] which states that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[125] The Court clarified that the "statutory maximum" is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[126] It further held that the Constitution limits the States' authority to reclassify elements as sentencing factors, but did not make clear where that line is drawn.[127]

The defendant in *Blakely* received a sentence greater than the standard range maximum because the judge found the defendant acted with deliberate cruelty, a fact neither submitted to a jury nor admitted by the defendant.[128] The maximum sentence for a class B felony, specifically second degree kidnapping, is ten years.[129] However, the facts in *Blakely* supported only a fifty-three-month sentence, the standard sentence plus factors justifying an exceptional sentence.[130] These other factors, stipulated to by the defendant in the guilty plea, included elements relating to a firearm allegation requiring a thirty-six-month enhancement over the standard sentence.[131] Had they not been included in the guilty plea, the judge would not have had justification to go beyond the standard sentence of thirteen to seventeen months.[132] The

122. *Id.*
123. *Id.* at 2538 n.9. *See infra* Part V.
124. Apprendi v. New Jersey, 530 U.S. 466 (2000).
125. *Blakely*, 124 S. Ct. at 2536.
126. *Id.*
127. *See id.* at 2537 n.6. The Court distinguished McMillan v. Pennsylvania, 477 U.S. 79 (1986), and Williams v. New York, 337 U.S. 241 (1949), as neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.
128. *Blakely*, 124 S. Ct. at 2537.
129. *Id.* at 2535 (discussing WASH. REV. CODE ANN. §§ 9A.40.030(3), 9A.20.021(1)(b) (2000)).
130. *Blakely*, 124 S. Ct. at 2535.
131. *Id.*
132. *Id.* at 2538.

judge therefore exceeded his authority by imposing a sentence well beyond the fifty-three months permitted.

Justice O'Connor dissented and discussed the effect that the majority's decision will have on sentencing guidelines and the judicial system in general.[133] In arguing against the results reached in *Apprendi* and *Blakely*, she stated that deference to legislative labels "would be easier to administer . . . as courts would not be forced to look behind statutes and regulations to determine whether a particular fact does or does not increase the penalty to which a defendant was exposed."[134] However, she further stated that ease of administration is not necessarily the goal, because it is the duty of the courts to decipher and interpret statutes and regulations that it finds ambiguous.[135] Rather than considering the number of defendants that are currently incarcerated possibly longer than what is constitutionally permissible, Justice O'Connor focused on the sentences imposed under the guidelines.[136] She expressed the view that these sentences are all in jeopardy and ignored the fact that many defendants' liberty rights may have already been sacrificed.[137]

However, Justice O'Connor misread the impact of the majority opinion. She discussed substantial costs such as "separate, full-blown jury trials during the penalty phase proceeding."[138] She described circumstances where the facts relevant to sentencing are not known prior to trial.[139] This scenario, albeit possible, shows that the state waits to meet its burden until after the defendant is convicted. Despite not knowing certain facts or details until trial, the state is still required to meet its burden of proving every element of the offense charged.

Justice Breyer disagreed only with the majority's conclusion.[140] He agreed that the distinction between sentencing factors and elements of an offense turns only on the label given by the legislature.[141] He departed from the majority by stating that the two concepts do not require the same treatment under the Sixth Amendment.[142] Justice Breyer then described three options for sentencing.[143] First, determinative sentencing

133. *See id.* at 2543-50 (O'Connor, J., dissenting). Justice O'Connor wrote that "today's decision casts constitutional doubt over them all" referencing states that have enacted guidelines systems, including Pennsylvania. *Id.* at 2549.
134. *Id.* (O'Connor, J., dissenting).
135. *Id.*
136. *Id.* at 2549.
137. *Id.*
138. *Id.* at 2546.
139. *See id.*
140. *Id.* at 2552. (Breyer, J., dissenting).
141. *Id.*
142. *Id.*
143. *See id.*

requires the same sentence for all offenders of the same crime, despite differences in the circumstances of the crime or the offender's criminal history.[144] Justice Breyer is correct in that this type of sentencing scheme would create over-uniformity, treating all cases identically and not allowing departures for actual differences in circumstances surrounding the crime. It further permits prosecutors to manipulate the sentence desired through choice of charge.[145] However, prosecutorial discretion is a feature of the United States criminal justice system. *Blakely* does not implicate any change in the discretion given to a prosecutor.

The second option described by Justice Breyer, indeterminate sentencing, allows too much discretion, permitting the abuses, unfairness and lack of uniformity that the sentencing guidelines intended to abolish.[146] This is the hallmark of the Pennsylvania system.

The final option is what the *Apprendi* rule intended. This option allows judges to decrease a sentence based on mitigating factors, but only allows increases of sentences based on aggravating factors if these factors were proven to a jury beyond a reasonable doubt.[147] Justice Breyer exaggerated the viability of this option. He claimed that the legislature would have to revamp crimes codes to subdivide each crime to allow common sentencing factors to be included in each statutorily defined crime.[148]

However, Justice Breyer's assertion is misguided. As stated above, the prosecutor would merely have the burden of proof to show that these sentencing factors were relevant to the case at hand. It would require only additional evidence and proof on the part of the prosecution. This would not necessitate a restructuring of crimes codes. Instead of allowing the prosecution to give notice of intent to use an enhancement factor after conviction and prior to sentencing,[149] a requirement that it be in the information and proved beyond a reasonable doubt would satisfy *Blakely*'s requirements. The Court in *Jones*[150] implemented this type of procedural requirement.

Justice Breyer incorrectly stated that defendants are put into the position of contesting material aggravating facts in the guilt phase of

144. *Id.* at 2552-53.
145. *Id.* at 2553.
146. *Id.*
147. *Id.* at 2554.
148. *Id.* at 2554-55.
149. *See, e.g.*, 42 PA. CONS. STAT. § 9712(b) (stating that "notice to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing").
150. *See* Jones v. United States, 526 U.S. 227 (1999).

their trials.[151] The prosecution has the burden to show every element and factor beyond a reasonable doubt. The burden is not on the defendant to show the negative. Justice Breyer's argument results in an improper burden-shifting, which due process itself sought to prevent.

Although Justice Breyer's concerns are legitimate, defendants are often put in the position of offering alternative defenses. However, one way to eliminate this potential for prejudice is to bifurcate the trial to have the jury hear additional evidence for enhancements after conviction for sentencing purposes. This would be no different than how trials and sentencing are bifurcated on whether to impose the death penalty. Another possibility is special verdict forms presented to the jury to determine whether any additional factors apply. As there are means to cope with the consequences of the *Blakely* decision, the focus should be on implementing these means to ensure that the constitutional guarantees of all persons are protected.

D. Pennsylvania Cases—Blanket Dismissal of Blakely

Despite the common assertion that the Pennsylvania Sentencing Guidelines are merely advisory, the Pennsylvania system is not immune to analysis or precluded from significant reconsideration in light of *Blakely* and *Booker*. However, a review of Pennsylvania case law yields many arguments based on *Blakely* that were summarily dismissed as inapplicable due to the advisory nature of the Pennsylvania Sentencing Guidelines.[152] Some courts have stated that *Blakely* will not affect the Pennsylvania Sentencing Guidelines since they are considered advisory.[153] These decisions have muddied the waters, as many courts are unsure how to or whether to apply *Blakely*.

Following the *Blakely* decision, the Superior Court in *Commonwealth v. Brice*[154] upheld a sentence in which a mandatory minimum was applied. A notation after the concurring opinion stated that "it would seem that a jury would be required to make this determination in future cases using the beyond a reasonable doubt

151. *Blakely*, 124 S. Ct. at 2555.

152. *See* Commonwealth v. Bromley, 862 A.2d 598 (Pa. Super. Ct. 2004) (stating that *Blakely* does not implicate the Pennsylvania indeterminate scheme, where there is no promise of a specific sentence); Commonwealth v. Rosetti, No.417-MDA-2004, 2004 WL 2808753 (Pa. Super. Ct. Dec. 8, 2004) (finding that *Blakely* does not apply because the facts authorized the statutory maximum sentence without reference to other facts not found by jury); Commonwealth v. Pugh, 67 Pa. D.&C.4th 458 (Pa. Com. Pl. 2004) (stating that *Blakely* does not apply to an indeterminate sentencing system).

153. *See, e.g.*, Commonwealth v. Gibson, 716 A.2d 1275 (Pa. Super. Ct. 1998); Commonwealth v. Mouzon, 812 A.2d 617, 621 (Pa. Super. Ct. 2002).

154. 856 A.2d 107 (Pa. Super. Ct. 2004).

standard."[155] The insight in that remark seems to have fallen by the way side, as the Superior Court has yet to hold that *Blakely* applies in Pennsylvania. In *Commonwealth v. Smith*,[156] the Superior Court again stated that *Blakely* is not applicable because the Pennsylvania sentencing system is indeterminate.[157] However, it clarified that *Blakely* may be implicated "to the extent that an enhanced minimum term leads to a longer period of incarceration by extending the date at which the defendant is eligible to be released."[158]

Though several decisions[159] reflect that the Sixth Amendment is not violated so long as the sentence is not beyond the statutory maximum, the courts are not reading clearly the problems in *Blakely*. Though the United States Supreme Court in *Blakely* makes confusing references to the "statutory maximum," the sentence imposed was greater than the guidelines *standard* range maximum, not the statutory maximum for that crime.

Until the Pennsylvania Supreme Court hears and decides this issue, the courts will continue to generate vastly different interpretations of *Blakely*'s effect on the Pennsylvania Guidelines.[160] The United States Supreme Court's recent decision may shed light on the fact that review of the Pennsylvania Guidelines is now necessary.[161]

V. *United States v. Booker*

One of the questions left open by *Blakely* was the effect, if any, *Blakely* had on the Federal Sentencing Guidelines.[162] Due to the lack of a conclusive statement regarding the Federal Sentencing Guidelines, courts applied *Blakely* to both state and federal guidelines systems, resulting in vastly different outcomes.[163]

---

155. *Id.* at 114 n.7 (Bender, J., concurring).

156. Commonwealth v. Smith, No.1016-EDA-2004, 2004 WL 2803331 (Pa. Super. Ct. Dec. 7, 2004).

157. *Smith,* 2004 WL 2803331, at *5.

158. *Id.*

159. *See, e.g.,* Commonwealth v. Smith, 863 A.2d 1172 (Pa. Super. 2004); Commonwealth v. Brice, 856 A.2d 114 (Pa. Super. 2004); Commonwealth v. Bromley, 862 A.2d 598 (Pa. Super. 2004).

160. *See* Commonwealth v. Schaffer, No.2128-WDA-2002, 2005 WL 54725, at *10 n.8 (Pa. Super. Ct. Jan. 12, 2005) (the Pennsylvania Superior Court has granted *en banc* review in Commonwealth v. Kleinicke, No. 986 MDA 2003, to determine the effect of *Blakely* on sentencing in Pennsylvania).

161. *See* United States v. Booker, 125 S. Ct. 738 (2005). *See infra* Part V.

162. Blakely v. Washington, 124 S. Ct. 2531, 2538 n.9 (2004) (stating that the Federal Sentencing guidelines were not before the Court).

163. *See, e.g.,* United States v. Pineiro, 2004 WL 1543170 (5th Cir. Jul. 12, 2004) (holding that the guidelines are constitutional); United States v. Montgomery, 2004 WL 1562904 (6th Cir. Jul. 14, 2004) (holding that the guidelines are unconstitutional); United States v. Ameline, 2004 WL 30326 (9th Cir. Jul. 21, 2004) (stating the guidelines are

As noted above, the majority expressly stated that it reserved any question regarding the Federal Guidelines.[164] The answer to the question concerning the constitutionality of the Federal Sentencing Guidelines was provided in *United States v. Booker* on January 12, 2005.[165] It only took three months for that important question to be presented to the Court, as it heard argument on *United States v. Booker*[166] and *United States v. Fanfan*[167] on October 4, 2004. Though the cases were consolidated on certiorari before the Supreme Court, this section limits the discussion to the results in *Booker*. The court in *Fanfan*, relying on *Blakely*, refused to impose a sentence based on the Federal Sentencing Guidelines and instead imposed a sentence based on the guilty verdict alone.[168]

The Court retained the guidelines as advisory by striking two provisions of the Federal Sentencing Act that made the guidelines mandatory.[169] The *Booker* Court began its analysis with a review of decisions interpreting sentencing procedures similar to that provided in this Comment.[170] Though the Government advanced several arguments attempting to distinguish *Blakely*'s ruling about the Washington guidelines from the Federal Sentencing Guidelines, the Court was not convinced.[171] An important part of the discussion involves the Court's review of the *Apprendi* rule. The Court clarified that "we were only considering a statute in that case . . . [i]t was therefore appropriate to state the rule in that case in terms of a 'statutory maximum' rather than answering a question not properly before us."[172]

This distinction is incredibly important for the Pennsylvania line of decisions that rejected *Apprendi* on the basis that the rule was limited to sentences that exceed the statutory maximum. However, the Court now makes clear that it used the language it did in stating the rule because that pertained to the matter before it. The Court has expressly stated that it did not intend for the rule in *Apprendi* to be so narrow.[173] A further statement verifies that neither *Apprendi* nor *Blakely* are limited to sentences that increase the maximum. "Applying *Blakely* to the

---

unconstitutional and severable).

164. *See Blakely*, 124 S. Ct. at 2538 n.9.

165. United States v. Booker, 125 S. Ct. 738 (2005).

166. *Id.*

167. United States v. Fanfan, 125 S. Ct. 738 (2005).

168. *Id.*

169. *Id. See also* 18 U.S.C. § 3553(b) (courts "shall" impose a sentence within the guideline range).

170. *See Booker*, 125 S. Ct. at 748. *See* discussion *supra* Part III.

171. *See id.* at 752.

172. *See id.* at 752-53.

173. *See id.* ("More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate").

Guidelines would invalidate a sentence that relied on such an enhancement if the resulting sentence was outside the range authorized by the jury verdict."[174]

The United States Supreme Court restated its proposition that the analysis is not concerned with what the legislature defines as elements of a crime, but rather "the constitutional safeguards" and "required procedures for finding the facts that determine the maximum permissible punishment."[175] It reaffirmed the holding in *Apprendi*, stating that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[176]

Though the Court again uses "maximum," it surely means the most a judge can sentence authorized by the facts proven beyond a reasonable doubt or admitted by the defendant alone. This is evident from later discussions in the opinion which dictate that "judicial factfinding to support an offense level determination or an enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant."[177]

The *Booker* Court also discussed the consequences of declaring the guidelines unconstitutional. It found that "[i]n many cases, prosecutors could avoid an *Apprendi* problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence."[178]

VI. Conclusion: What the Future Holds for Pennsylvania

The Superior Court in *Smith*[179] reminds us that the United States Supreme Court in *Harris v. United States*[180] determined that "the Pennsylvania indeterminate system does not violate the Sixth Amendment so long as the enhanced minimum sentence is not beyond that authorized by the jury verdict."[181] The Court in *Booker* restates the *Apprendi* rule to allow more forgiving procedures and more protection of

174. *Id.* at 753.
175. *Id.* at 755.
176. *Id.* at 756.
177. *Id.* at 775.
178. *Id.* The Court further stated that a requirement of jury factfinding for certain issues can be implemented without difficulty in the vast majority of cases. In fact, according to the Court, the Department of Justice had already instituted procedures to protect future cases "from *Blakely* infirmity." *Id.* at 779.
179. Commonwealth v. Smith, No.1016-EDA-2004, 2004 WL 2803331, at *5 (Pa. Super. Ct. Dec. 7, 2004).
180. Harris v. United States, 536 U.S. 545 (2002).
181. *Id.*

the Sixth Amendment guarantees.

Allowing the jury to find only those facts that the legislature considers elements and then permitting the judge to sentence based on any other fact would produce an arbitrary system, which is a result the Sentencing Guidelines intended to prevent. The Court in *Booker* made clear that a judge is not permitted to increase a sentence by relying on facts not presented to the jury or admitted by the defendant. It made clear that a judge may not impose any sentence other than what the jury verdict or defendant's stipulations allow.

Pennsylvania must make considerable changes to the current sentencing system for compliance with *Blakely* and *Booker*. Nearly all provisions of the Sentencing Guidelines provide that certain enhancements are not elements and need only be found by the judge by a preponderance of the evidence.[182] Some provisions even provide for an increase in the upper limit or the maximum sentencing range.[183] These provisions cannot withstand even the *Apprendi* rule, in that they permit a judge to increase a sentence beyond the statutory maximum.

Further, not every defendant opts for a jury trial. Many defendants do not have a jury trial, by virtue of plea agreements or otherwise. If the dissenters in *Blakely* believe that the result is simplified by allowing juries to decide elements and judges to decide sentencing factors, what happens when the defendant pleads and foregoes his right to trial by jury? The plea agreement must include the sentencing factors so the defendant is truly apprised of the ranges of sentencing that may be imposed. Can the defendant truly understand what he is pleading to, what he has given up when he pleads guilty? Is he agreeing that he may receive a particular sentence, only to be "surprised" by the imposition of an enhancement by the prosecution or judge in considering factors to which the defendant did not agree, admit or stipulate?

The inherent unfairness of this system seems to be what the Guidelines were intending to avoid. The necessary step is not to forego the sentencing guidelines by declaring them unconstitutional, but rather to advance their importance by considering the relevance of sentencing enhancements and other factors during the trial and plea bargaining stage. If the defendant is apprised, at the time of trial or prior thereto, that he is subject to an enhanced sentence because a firearm is involved, he may better ascertain the options of foregoing trial and pleading or continuing with trial. In fact, requiring the prosecution to state these

182. *See, e.g.*, 42 PA. CONS. STAT. § 9701 (Proof at Sentencing provision).

183. *See, e.g.*, 204 PA. CODE § 303.13 (1994) (Guideline sentence recommendations: aggravated and mitigated circumstances) (may impose a sentence that is up to nine months longer than the upper limit of the standard range).

items in the information might afford better protection to the defendant. Regardless of the option the defendant chooses, the prosecution is not relieved of their burden of proof of what actually took place in the circumstances of the crime.

One concern is a substantial increase in the number of prisoner petitions under the Post Conviction Relief Act that would cite *Blakely* and allege an illegal sentence. Many defendants have been petitioning for post-collateral relief and citing *Blakely* in the hopes that a decision will be rendered in their favor, with a finding *Blakely* does, in fact, apply to the Pennsylvania Guidelines. Though the United States Supreme Court did not make the decisions in *Blakely* or *Booker* have retroactive effect, it is still difficult to determine the number of cases that are affected by the *Blakely* decision. We have yet to determine its potential impact on the individual state sentencing guidelines. But the Court in *Booker* recognizes:

> In some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.[184]

184. *Booker*, 125 S. Ct. 738.

***